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# Are We Only Burning Witches? The Antiterrorism and Effective Death Penalty Act of 1996's Answer to Terrorism

JENNIFER A. BEALL\*

## INTRODUCTION

Almost a year to the day after the tragedy in Oklahoma City,<sup>1</sup> President Clinton signed into law the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA" or "the Act").<sup>2</sup> Upon signing the AEDPA President Clinton stated, "It stands as a tribute to the victims of terrorism and to the men and women in law enforcement who dedicate their lives to protecting all of us from the scourge of terrorist activity."<sup>3</sup>

In its haste to calm the fears of the nation, the U.S. government may have practiced the "politics of the last atrocity."<sup>4</sup> Congress and the President may have too willingly sacrificed the individual liberties and freedoms guaranteed by the Constitution for a quick "solution" to terrorism.<sup>5</sup> Similar reactions in times of crisis are not unusual,<sup>6</sup> but hindsight reveals how unnecessary, damaging, and

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1. On April 19, 1995, a bomb exploded outside the Alfred P. Murrah Federal Building in Oklahoma City, killing 167. See Thomas C. Martin, Note, *The Comprehensive Terrorism Prevention Act of 1995*, 20 SETON HALL LEGIS. J. 201, 201-02 (1996).

2. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214. President Clinton signed the AEDPA on April 24, 1996.

3. President's Statement on Signing the Antiterrorism and Effective Death Penalty Act of 1996, 32 WEEKLY COMP. PRES. DOC. 719, 721 (Apr. 29, 1996) [hereinafter President's Statement].

4. *Counterterrorism Legislation: Hearings on S. 390 and S. 735 Before the U.S. Senate Subcomm. on Terrorism, Tech. and Gov't Info.*, 104th Cong. 61 (1995) (testimony of Father Sean McManus, President, Irish National Caucus) (urging U.S. Senate not to engage in the "politics of the last atrocity"). Father McManus urged Congress not to take advantage of the bombing, "the last atrocity," by trying to score political points. *Id.* He warned, "Destroying constitutional rights is not the way to build a memorial to the dead in Oklahoma City, nor is it the way to protect Americans from terrorism, nor is it the way to fight terrorism." *Id.*

5. See Joseph D. McNamara, Editorial, *Bombs and the Bill of Rights*, WALL ST. J., May 5, 1995, at A10 (pointing out that probably none of the suggested antiterrorism legislation would have prevented the Oklahoma City bombing). The article concludes, "It would be ironic if anti-terrorist legislation helped destroy the protections of our Constitution and turned the delusions of the paranoids into reality." *Id.*

6. See generally *Dennis v. United States*, 341 U.S. 494, 516 (1951) (upholding convictions under the Smith Act for conspiracy to organize the Communist Party of the United States for the purpose of advocating the necessity of overthrowing the government "as speedily

drastic they can be.<sup>7</sup> As Justice Brandeis pointed out, in the past, “[m]en feared witches and burnt women.”<sup>8</sup>

This Note argues that lawmakers may have once again sidestepped the Constitution, at a time when the public is too traumatized and outraged to realize the consequences.<sup>9</sup> The fundamental rights guaranteed by the Bill of Rights must not be curtailed under the guise of national security.<sup>10</sup> Terrorism is a serious challenge, but by abandoning the freedoms of speech and association and the right to due process, we are giving in to terrorists.<sup>11</sup> Part I lays out the AEDPA’s legislative history and major provisions. Part II places the current legislation in historical context by examining the country’s battle between the Constitution and the fear of Communism in the first half of this century. Then, Part III examines the AEDPA’s ban on fundraising and its implications for free speech and association. Finally, Part IV examines due-process concerns that arise from the Act’s deportation provisions.

### I. LEGISLATIVE HISTORY AND MAJOR PROVISIONS OF THE AEDPA

Although eventually spurred on by the Oklahoma City bombing, the AEDPA is a culmination of several U.S. bombings and the bills proposed by the President and members of Congress as a result of those bombings. President Clinton first introduced antiterrorism legislation in February of 1995, approximately two months before the tragic incident in Oklahoma City.<sup>12</sup> That legislation, the Omnibus Counterterrorism Act of 1995,<sup>13</sup> was a response to the 1993 World Trade Center bombing in New York City. One week after the Oklahoma City

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as circumstances would permit”); *Korematsu v. United States*, 323 U.S. 214 (1944) (upholding the constitutionality of the internment of Japanese Americans during World War II).

7. Donald M. Haines reminded Congress of this:

Who on this Committee, or in this Administration, would now defend the forced removal, relocation and internment of Japanese-Americans during World War II? That action still stands as a shameful blot on our image of America as a fair country—even though that action was supported by virtually all the executive branch and congressional leaders of the day and, moreover, was popular with the voters.

*Terrorism in the United States: The Nature and Extent of the Threat and Possible Legislative Response: Hearings Before the Senate Judiciary Comm.*, 104th Cong. 163 (1995) [hereinafter *Terrorism Hearings*] (statement of Donald M. Haines, Legislative Counsel, ACLU).

8. *Whitney v. California*, 274 U.S. 357, 376 (1927) (Brandeis, J., concurring) (warning about irrational fears concerning Communism).

9. In unsettled times, “[t]he majority may be willing to accept broad, vaguely defined law enforcement powers when the minority’s constitutional rights are at stake, but the tools used against ‘them’ today can easily be turned against ‘us’ tomorrow.” Note, *Blown Away? The Bill of Rights After Oklahoma City*, 109 HARV. L. REV. 2074, 2091 (1996).

10. See *Terrorism Hearings*, *supra* note 7, at 163 (testimony of James X. Dempsey, Deputy Director, Center for National Security Studies).

11. See *id.*

12. See President’s Statement, *supra* note 3, at 719.

13. S. 390, 104th Cong. (1995).

bombing, on April 26, 1995, the President presented an expanded version of the bill to the Senate and urged quick action.<sup>14</sup>

The following day, April 27, Senators Bob Dole and Orrin Hatch introduced a similar bill, the Comprehensive Terrorism Prevention Act of 1995.<sup>15</sup> With overwhelming bipartisan support, this bill passed through the Senate within two months of the bombing on June 7, 1995.<sup>16</sup> The debate lasted only four days in the Senate,<sup>17</sup> but the bill was stalled in the House until a modified version finally passed on March 14, 1996<sup>18</sup> as the first anniversary of the bombing quickly approached.

Probably not coincidentally, the final conference-bill version passed through Congress on April 19, 1996, the first anniversary of the Oklahoma City bombing.<sup>19</sup> President Clinton signed the AEDPA into law on April 24, 1996.<sup>20</sup> The Act's stated purpose is to "deter terrorism, provide justice for victims, provide for an effective death penalty, and for other purposes."<sup>21</sup> The AEDPA is composed of nine titles covering a wide scope and amending numerous sections of the *United States Code*.<sup>22</sup>

While this Note will focus on several of the antiterrorism provisions of the Act, other provisions have received attention from authors and the courts or deserve mention.<sup>23</sup> One significant and controversial provision revises federal habeas-corpus procedures<sup>24</sup> by establishing a one-year statute of limitations,<sup>25</sup>

14. See S. 761, 104th Cong. (1995); Martin, *supra* note 1, at 210-19 (providing a detailed explanation of the legislative history of S. 761 and S. 735).

15. S. 735, 104th Cong. (1995).

16. See Melissa A. O'Loughlin, Note, *Terrorism: The Problem and the Solution—The Comprehensive Terrorism Prevention Act of 1995*, 22 J. LEGIS. 103, 106 (1996). The vote was 91 yeas to 8 nays. See 141 CONG. REC. S7857 (daily ed. June 7, 1995).

17. See Martin, *supra* note 1, at 205.

18. See Effective Death Penalty and Public Safety Act of 1996, H.R. 2703, 104th Cong.; 141 CONG. REC. H2267 (daily ed. Mar. 14, 1996) (passed 229-191); Note, *supra* note 9, at 2075.

19. See Robert Plotkin, *First Amendment Challenges to the Membership and Advocacy Provisions of the Antiterrorism and Effective Death Penalty Act of 1996*, 10 GEO. IMMIGR. L.J. 623, 625 (1996) (stating that bill passed with few changes).

20. Pub. L. No. 104-132, 110 Stat. 1214 (1996).

21. *Id.* at 1214.

22. The titles cover such areas as habeas-corpus reform, justice for victims, international terrorism prohibitions, terrorist and criminal alien removal and exclusion, nuclear, biological, and chemical weapons restrictions, implementation of plastic-explosives convention, criminal-law modifications to counter terrorism, and assistance to law enforcement. See *id.*

23. This discussion is not meant to be exhaustive but only to point out a few other areas addressed by the Act.

24. See generally President's Statement, *supra* note 3, at 720 ("I have long sought to streamline Federal appeals for convicted criminals sentenced to the death penalty."); Martin, *supra* note 1, at 233-40 (discussing the proposed reform before the Act passed).

25. See Antiterrorism and Effective Death Penalty Act § 101, 110 Stat. at 1217 (amending 28 U.S.C. § 2244(d)(1) (1994)).

restricting federal habeas-corpus review of state-court decisions,<sup>26</sup> and severely discouraging second or successive petitions.<sup>27</sup> Another notable provision is for victims, and includes mandatory victim restitution for certain offenses<sup>28</sup> and closed-circuit television proceedings for victims when venue has been changed.<sup>29</sup>

The great force behind the AEDPA lies in those provisions relating to terrorist activity; consequently, those provisions are the focus of this Note. First, Title III of the Act criminalizes financial contributions that are made to designated terrorist organizations, whether or not they are made for the peaceful or otherwise legal activities of the group.<sup>30</sup> Second, in Title IV, alien-terrorist-removal procedures provide for the use of secret and illegally obtained evidence in deportation hearings.<sup>31</sup> Under Title IV, deportation can be based solely on membership in one of the designated organizations defined in Title III.<sup>32</sup> Finally, this Note will consider the criminal alien-removal provision of Title IV which for certain criminal aliens mandates detention, leaving no discretion to the Attorney General, pending a deportation hearing.<sup>33</sup>

## II. PAST REACTIONS TO ANTIGOVERNMENT ACTIVITY: THE GOVERNMENT'S REACTION TO COMMUNISM

In order to understand the future impact of the AEDPA provisions that will be discussed in detail in Parts III and IV, it is important to look back at a similar time of fear and overreaction:

Public opinion being what it now is, few will protest the conviction of these Communist petitioners. There is hope, however, that in calmer times, when present pressures, passions and fears subside, this or some later Court will

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26. *See id.* § 104(3), 110 Stat. at 1219 (amending 28 U.S.C. § 2254). This section provides that the writ may only be granted when the adjudication of the claim in state court: "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law . . . or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." *Id.*

27. *See id.* § 106(b), 110 Stat. at 1220-21 (amending 28 U.S.C. 2244(b)) (requiring successive petitions to be approved by a court of appeals panel and to be based on newly discovered evidence or new constitutional rights established by the Supreme Court and retroactively applied, and further requiring for a successive habeas petition that the facts, when viewed in light of the evidence as a whole, establish by clear and convincing evidence that no reasonable fact finder would have found the person guilty).

In *Felker v. Turpin*, 116 S. Ct. 2333 (1996), the Supreme Court considered whether § 106(b)(3)(E) was an unconstitutional restriction on the Court's jurisdiction. The Court held that "although the Act does impose new conditions on our authority to grant relief, it does not deprive this Court of jurisdiction to entertain original habeas petitions." *Id.* at 2337.

28. *See Antiterrorism and Effective Death Penalty Act* §§ 201-211, 110 Stat. at 1227-41.

29. *See id.* § 235, 110 Stat. at 1246-47 (applying when venue has moved out of state and over 350 miles away).

30. *See infra* notes 59-105 and accompanying text. The Act also criminalizes assistance to terrorist states in §§ 321-330 but those provisions are not discussed further in this Note.

31. *See Antiterrorism and Effective Death Penalty Act* § 401, 110 Stat. at 1259-60 (establishing removal court and procedures); *infra* notes 106-40 and accompanying text.

32. *See infra* note 131.

33. *See infra* notes 135-40 and accompanying text.

restore the First Amendment liberties to the high preferred place where they belong in a free society.<sup>34</sup>

American fear and persecution of Communists began in the early part of this century and continued for at least fifty years with arrests, prosecutions, and deportations.<sup>35</sup> By 1919, the majority of states had enacted some combination of "red flag" laws, "criminal syndicalism" laws, or anarchy and sedition laws.<sup>36</sup> The federal government also had amended the Espionage Act of 1917 with the Sedition Act of 1918.<sup>37</sup>

The first of many unsuccessful<sup>38</sup> constitutional challenges reached the Supreme Court in 1919.<sup>39</sup> In upholding the defendants' convictions under the Espionage Act, the majority admitted that "in ordinary times the defendants in saying all that was said in the circular would have been within their constitutional rights."<sup>40</sup>

In 1940, the federal government enacted the Alien Registration Act (the "Smith Act")<sup>41</sup> to directly regulate political speech.<sup>42</sup> One provision stated that an alien could be deported based on past beliefs, advocacy, or membership in an organization that advocated forcible overthrow of the government.<sup>43</sup> The key provision made knowing membership in any such organization illegal with a penalty of up to twenty years imprisonment.<sup>44</sup>

The top eleven Communist Party leaders in the United States were convicted under the Smith Act.<sup>45</sup> The Supreme Court in *Dennis* upheld the convictions for conspiring to organize the Party for the purpose of advocating and teaching the overthrow of the government "as speedily as the circumstances would permit."<sup>46</sup> The defendants were convicted merely for joining "together to advocate a doctrine," with no proof of "imminent danger."<sup>47</sup> In dissent, Justice Black stated that "the only way to affirm these convictions is to repudiate directly or

34. *Dennis v. United States*, 341 U.S. 494, 581 (1951) (Black, J., dissenting).

35. See generally Marc Rohr, *Communists and the First Amendment: The Shaping of Freedom of Advocacy in the Cold War Era*, 28 SAN DIEGO L. REV. 1 (1991) (providing a detailed history of the evolution of Communism and the First Amendment).

36. See *id.* at 4.

37. Sedition Act of 1918, Pub. L. No. 65-150, § 3, 40 Stat. 553, 553-54 (making it a crime to utter language intended to bring the United States government into contempt, scorn, or disrepute) (repealed 1921).

38. Of approximately 2000 prosecutions under the Sedition Act, about 900 were convicted. See RODNEY A. SMOLLA, *FREE SPEECH IN AN OPEN SOCIETY* 97 (1992).

39. See *Schenck v. United States*, 249 U.S. 47 (1919) (upholding convictions for causing and attempting to cause insubordination in the military and naval forces based on defendants' distribution of leaflets to enlisted men opposing World War I and the draft).

40. *Id.* at 52.

41. See Rohr, *supra* note 35, at 7.

42. See *id.* at 10.

43. See *id.* at 11-12 (citing 18 U.S.C. § 2385 (1982), which consolidated the 1940 statute and other sections into one statute).

44. See *id.* at 11 (explaining how the Alien Registration Act included advocacy and organization as illegal).

45. See *Dennis v. United States*, 341 U.S. 494 (1951).

46. *Id.* at 516.

47. WALTER GELLHORN, *AMERICAN RIGHTS* 75-77 (1960); see also Rohr, *supra* note 35, at 58-59.

indirectly the established 'clear and present danger' rule."<sup>48</sup> He continued, "The [First] Amendment as so construed is not likely to protect any but those 'safe' or orthodox views which rarely need its protection."<sup>49</sup>

Several more repressive laws were enacted during the 1940s and 1950s.<sup>50</sup> In 1947, the Attorney General published a list of subversive organizations.<sup>51</sup> Finally, over President Truman's veto, Congress enacted the detailed and comprehensive McCarran Act in 1950.<sup>52</sup> The McCarran Act required the registration of all Communist Party members, prohibited any Party member from working in a defense facility, holding office with a labor organization, or, among other things, obtaining a passport, and sometimes required the deportation of past or present Party members.<sup>53</sup> In *Communist Party of the United States v. Subversive Activities Control Board*, the Supreme Court upheld the McCarran Act and an order requiring the Communist Party to register, despite First Amendment right-to-association and due-process challenges.<sup>54</sup> In yet another dissent, Justice Black stated:

I regret, exceedingly regret, that I feel impelled to recount this history of the Federalist Sedition Act because, in all truth, it must be pointed out that this law—which has since been almost universally condemned as unconstitutional—did not go as far in suppressing the First Amendment freedoms . . . as do the Smith Act and the Subversive Activities Control Act.<sup>55</sup>

Finally, in 1960, the Supreme Court considered the constitutionality of the membership clause of the Smith Act.<sup>56</sup> By reading specific intent as to the criminal ends of the organization and active membership into the requirements for conviction under the Smith Act, the Court by a 5-4 margin upheld a conviction for membership.<sup>57</sup> In his dissent, Justice Douglas cited a passage which provides a good summary of the history discussed in this Part, and the lessons that should be remembered when considering Parts III and IV:

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48. *Dennis*, 341 U.S. at 579-80 (Black, J., dissenting).

49. *Id.* at 580 (Black, J., dissenting). Although *Yates v. United States*, 354 U.S. 298 (1957), did not overrule *Dennis*, it limited *Dennis* by holding that "[t]he essential distinction is that those to whom the advocacy is addressed must be urged to do something, now or in the future, rather than merely to believe in something." *Id.* at 324-25 (emphasis in original).

50. See LEE C. BOLLINGER, *THE TOLERANT SOCIETY* 94 (1986). "It is a sobering fact that even the ACLU succumbed to the rabid intolerance of the 1940s and 1950s by purging suspected Communists from its official hierarchy and by assisting the FBI in identifying 'subversives.'" *Id.*

51. See Rohr, *supra* note 35, at 12.

52. See *id.* at 13-14.

53. See *Communist Party of the United States v. Subversive Activities Control Bd.*, 367 U.S. 1, 4-19 (1961) (setting out the pertinent portions of the McCarran Act as amended by the Communist Control Act of 1954).

54. See *id.* at 103.

55. *Id.* at 159-60 (Black, J., dissenting).

56. See *Scales v. United States*, 367 U.S. 203 (1960) (upholding the constitutionality of a clause that made the acquisition or holding of knowing membership in an organization which advocates government overthrow by force or violence a felony).

57. See *id.* at 209, 228.

The perils sought to be suppressed are regularly overestimated. History shows in one example after another how excessive have been the fears of earlier generations, who shuddered at menaces that, with the benefit of hindsight, we now know were mere shadows. This in itself should induce the modern generation to view with prudent skepticism the recurrent alarms about the fatal potentialities of dissent. . . . [T]he lovers of freedom cannot afford to sacrifice their moral superiority by adopting totalitarian methods in order to create a self-deluding sense of security. Suppression, once accepted as a way of life, is likely to spread.<sup>58</sup>

Regretfully, as the following discussion will demonstrate, Congress did not heed Justice Douglas's warning or learn from our history of overreaction. Suppression has spread through many provisions of the AEDPA, affecting the rights of American citizens and legal resident aliens.

### III. THE AEDPA'S FUNDRAISING BAN AND THE FIRST AMENDMENT

The AEDPA criminalizes financial contributions to any organization designated as a foreign terrorist organization by the Secretary of State.<sup>59</sup> This means that a U.S. citizen can be imprisoned for up to ten years for making political contributions,<sup>60</sup> even if he is contributing only to the legal, peaceful activities of the organization.<sup>61</sup> There is absolutely no requirement that the government prove an individual had the specific intent to advance the illegal aims of the group through his contribution.<sup>62</sup> Prior to the AEDPA this type of peaceful, humanitarian support was expressly protected in the Violent Crime

58. *Id.* at 274-75 n.8 (Douglas, J., dissenting) (citing GELLHORN, *supra* note 47, at 83).

59. See Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 303(a), 110 Stat. 1214, 1250-53 (amending 18 U.S.C. by adding § 2339B). Section 303(a) provides:

(1) UNLAWFUL CONDUCT.—Whoever, within the United States or subject to the jurisdiction of the United States, knowingly provides material support or resources to a foreign terrorist organization . . . shall be fined . . . or imprisoned not more than 10 years, or both.

*Id.* § 303(a), 110 Stat. at 1250. "[M]aterial support or resources" is defined as "currency or other financial securities, financial services, lodging, training, safehouses, false documentation or identification, communications, explosives, personnel, transportation, and other physical assets, except medicine or religious materials." *Id.* § 323, 110 Stat. at 1255 (amending 18 U.S.C. § 2339A (1994)).

60. See *id.* § 303(a), 110 Stat. at 1250.

61. See *Terrorism Hearings*, *supra* note 7, at 161 (testimony of James X. Dempsey, Deputy Director, Center for National Security Studies).

62. The Ninth Circuit, considering the First Amendment in the deportation context, recently stated that "targeting individuals because of activities such as fundraising is impermissible unless the government can show that group members had the specific intent to pursue illegal group goals." *American-Arab Anti-Discrimination Comm. v. Reno*, 119 F.3d 1367, 1376 (9th Cir. 1997), *petition for cert. filed*, 66 U.S.L.W. 3523 (U.S. Jan. 30, 1998) (No. 97-1252). Although this decision was not premised on the AEDPA, it seriously questions the fundraising provision's constitutionality. See William Claiborne, *New Antiterrorism Law Suffers Legal Setbacks; Appeals Court Rejects Palestinians' Deportation*, WASH. POST, July 11, 1997, at A18.



Control and Law Enforcement Act of 1994 for First Amendment reasons.<sup>63</sup> This Part argues that the fundraising ban is an unconstitutional restriction on free speech and association.<sup>64</sup>

In *Buckley v. Valeo*,<sup>65</sup> the Supreme Court established that attempts to regulate financial-campaign contributions implicate the First Amendment. In the Court's words, "virtually every means of communicating ideas in today's mass society requires the expenditure of money."<sup>66</sup> Contributing to an organization is a symbol of support.<sup>67</sup> The contribution provisions considered in *Buckley* are very similar to the fundraising ban in the AEDPA. Although the limitations on federal-campaign contributions were upheld in *Buckley*, the complete ban on similar contributions in the AEDPA probably would not survive *Buckley* scrutiny. However, contributions to terrorist organizations might constitutionally be limited because "[t]he quantity of communication . . . does not increase perceptibly with the size of . . . contribution."<sup>68</sup> Nevertheless, such contributions could not be completely banned without satisfying strict scrutiny or the clear-and-present-danger test.

The AEDPA's complete ban on speech in the form of contributions to particular groups certainly would not satisfy strict scrutiny. As the name implies, strict scrutiny is a difficult test for the government to overcome.<sup>69</sup> The government must show that the ban is "necessary to serve a compelling interest and that it is narrowly drawn to achieve that end."<sup>70</sup>

Since designated groups and their contributors are often expressing dissatisfaction with the government,<sup>71</sup> much of the speech that would be banned

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63. See *Terrorism Hearings*, *supra* note 7, at 162 (testimony of James X. Dempsey, Deputy Director, Center for National Security Studies). In his testimony before the Senate Judiciary Committee, James Dempsey pointed out that the AEDPA would repeal a provision of 18 U.S.C. § 2339A that was adopted in 1994. Section 2339A(c)(2) provides that "[a]n investigation may not be initiated or continued . . . based on activities protected by the First Amendment . . . including . . . the provision of financial support for the nonviolent political, religious, philosophical, or ideological goals or beliefs of any person or group." 18 U.S.C. § 2339A(c)(2).

64. See *NAACP v. Alabama*, 357 U.S. 449 (1958) (holding that the First Amendment protects the right of association).

65. 424 U.S. 1 (1976).

66. *Id.* at 19.

67. See *id.* at 21.

68. *Id.*

69. See *Burson v. Freeman*, 504 U.S. 191, 200 (1991) ("[A] law rarely survives such scrutiny.").

70. *Id.* at 198 (holding 100-foot campaign-free polling zone constitutional because it was necessary to serve the compelling right to cast a ballot free of intimidation and fraud); see also *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1988) (holding total ban on indecent telephone communications unconstitutional despite compelling interest of protecting the physical and psychological well-being of minors because such a ban was not the least restrictive means).

71. See generally Antonio Cassese, *Human Rights and Humanitarian Law: Terrorism and Human Rights*, 31 AM. U. L. REV. 945, 946 (1982) ("[T]errorists are inspired by political motives and seek to overthrow the existing legal order or to bring about radical change in the fabric of society.").

is core political speech. Here, the government is singling out politically unpopular organizations and mandating that American citizens not express their support for these organizations through contributions. "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."<sup>72</sup> This questions whether the government's interest in ridding the country of terrorist speech is legitimate, much less compelling. The government is likely to broadly define its interest as protecting the public from terrorism rather than from terrorist speech. Admittedly, the courts may be more likely to find the governmental interest sufficiently compelling to satisfy the first prong of strict scrutiny.

Even assuming that the interests are compelling, the ban on contributions would not pass the second prong of the strict-scrutiny test, because a total ban is not the least restrictive means.<sup>73</sup> First, it is unclear whether every designated organization will actually use the funds for political dissent. Under the Act, the Secretary of State has the broad power to designate a wide variety of groups<sup>74</sup> with limited safeguards against wrongful designation.<sup>75</sup> Therefore, many politically unpopular organizations may be unnecessarily designated simply because one extreme member, for example, attempted to harm someone with a firearm. Second, there are other alternatives to limit the negative effects of terrorism besides banning free speech, especially speech that supports the legal, peaceful aspects of an organization. The government should rely on the tools it already possesses to prosecute terrorist attempts and conspiracies instead of this provision which threatens free speech and could place an individual in jail for ten years without any showing of intent. The government "has sufficient means at its disposal to prevent such behavior without adding the First Amendment to the fire."<sup>76</sup>

This type of speech also does not fit into the most recent expression of the clear-and-present-danger category of unprotected speech as set out in *Brandenburg v. Ohio*.<sup>77</sup>

72. *Texas v. Johnson*, 491 U.S. 397, 414 (1989).

73. "It is not enough to show that the Government's ends are compelling; the means must be carefully tailored to achieve those ends." *Sable*, 492 U.S. at 126 (holding that a total ban on indecent telephone communications unnecessarily restricts adult access to communications only unsuitable for children). *But cf.* Note, *supra* note 9, at 2081 (arguing that the AEDPA's ban is the least restrictive means and therefore constitutional because a lesser restrictive means such as a cap on funding would not prevent terrorism). In response, I would argue that a ban would not prevent terrorism either, and the best way to fight terrorism is through constitutional means. See *infra* text accompanying note 76.

74. See *infra* notes 100-03 and accompanying text.

75. See *infra* note 104 and accompanying text.

76. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 396 (1992) (facially invalidating St. Paul's Bias-Motivated Crime Ordinance in a case where the defendant burned a cross on the yard of a black family).

77. 395 U.S. 444 (1969) (holding Ohio's Criminal Syndicalism law unconstitutional, and overturning conviction of Ku Klux Klan leader because the statute punished mere advocacy without requiring incitement to imminent lawless action).

[T]he constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to *inciting or producing imminent lawless action and is likely to incite or produce such action*.<sup>78</sup>

The immediacy element is very strong,<sup>79</sup> and, though financial contributions may make unlawful terrorist activity more likely, it is unlikely that the threat meets this immediacy test.<sup>80</sup> In the majority of cases, an individual's donation will lead to *future* illegal action. Therefore, the AEDPA cannot be upheld under this category of unprotected speech.

Although the AEDPA does not satisfy strict scrutiny or fit into the clear-and-present-danger category, some may argue that the Act really regulates conduct and not speech.<sup>81</sup> If the contributions can be described as conduct,<sup>82</sup> then the intermediate test of *United States v. O'Brien*<sup>83</sup> would apply. However, the ban would still fail because the government interest is not "unrelated to the suppression of free expression."<sup>84</sup>

78. *Id.* at 447 (emphasis added).

79. As early as 1919, Justice Holmes stressed the importance of protecting speech at least until the threat is imminent:

Every year if not every day we have to wager our salvation upon some prophecy based upon imperfect knowledge. While that experiment is part of our system I think that we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country.

*Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

80. The strength of the immediacy requirement can also be seen in *Hess v. Indiana*, 414 U.S. 105 (1973), which held that the immediacy requirement was not satisfied when the defendant stated, while facing an angry crowd of antiwar demonstrators, "We'll take the f—ing streets later." See also Rohr, *supra* note 35, at 100-01 (describing the emphasis on immediacy). But see Note, *supra* note 9, at 2082 (arguing that the AEDPA's ban is facially constitutional, satisfying the *Brandenburg* test).

81. See Note, *supra* note 9, at 2082-83.

82. In *Buckley*, the Court found this argument unpersuasive: "The expenditure of money simply cannot be equated with such conduct as the destruction of a draft card." *Buckley v. Valeo*, 424 U.S. 1, 16 (1976).

83. 391 U.S. 367 (1968). According to the *O'Brien* two-track test, government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

*Id.* at 377 (upholding defendant's conviction for willfully and knowingly burning his draft card because the government's interest in the availability of draft cards was unrelated to the suppression of speech, and because the law was the only way to prevent destruction).

84. *Id.* at 377; see also *R.A.V. v. City of St. Paul*, 505 U.S. 377, 385 (1992) ("[N]onverbal expressive activity can be banned because of the action it entails, but not because of the ideas it expresses."); *American-Arab Anti-Discrimination Comm. v. Reno*, 119 F.3d 1367, 1376 (9th Cir. 1997) (holding *O'Brien* inapplicable because fundraising restrictions are in effect content-based, impermissibly targeting plaintiffs due to group affiliation), *petition for cert. filed*, 66 U.S.L.W. 3523 (U.S. Jan. 30, 1998) (No. 97-1252).

As one author points out, *O'Brien* can easily be abused<sup>85</sup> because "all laws restricting freedom of speech are passed because of some 'interest unrelated to free expression.'"<sup>86</sup> Of course, the government promoted the law as a concern for national security and the threat of terrorism,<sup>87</sup> but the question is whether the reasons for the law are based only on the noncommunicative aspects of the regulated conduct.<sup>88</sup> *Buckley* answers this question by stating, "[I]t is beyond dispute that the interest in regulating the alleged 'conduct' of giving . . . money 'arises in some measure because the communication allegedly integral to the conduct is itself thought to be harmful.'"<sup>89</sup>

Proponents of the AEDPA may also argue that the legislation is aimed at the secondary effects of the contributions, such as money being used for bombs.<sup>90</sup> Although this argument may sound persuasive, it does not justify the AEDPA's complete ban on contributions. This secondary-effects argument has been persuasive to the Supreme Court in zoning-ordinance cases.<sup>91</sup> In *Renton v. Playtime Theatres, Inc.*, the Court upheld a zoning ordinance that was designed to prevent the secondary effects of crime and diminished property values by prohibiting adult theaters in residential areas.<sup>92</sup> The Court held that the governmental interest was substantial, that the ordinance was narrowly tailored because it reached only the theaters that produced the secondary effects, and that the ordinance left open reasonable alternative avenues of communication because there was still land available in the city.<sup>93</sup> Applying this test to the AEDPA, the government would definitely have a substantial interest, but the Act is not narrowly tailored to reach only those donations intended to be used for violence. In addition, alternative avenues are not left open because this is a complete ban. Therefore, the secondary-effects argument will not save the AEDPA from a First Amendment attack.

The AEDPA ban not only unconstitutionally burdens free speech, but it also impinges on the right of association. Under the Act, individuals are forced to choose between going to jail or not contributing to a designated foreign organization, even though they may only want to support the legal aims of the

85. See SMOLLA, *supra* note 38, at 54 ("[*O'Brien* is] one of the most important free speech decisions in American history—and also one of the most abused.").

86. *Id.* at 58 (emphasis in original) (paraphrasing *O'Brien*).

87. Congress's first finding under the fundraising provision stated that "international terrorism is a serious and deadly problem that threatens the vital interests of the United States." Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 301(a)(1), 110 Stat. 1214, 1247.

88. See SMOLLA, *supra* note 38, at 58.

89. *Buckley v. Valeo*, 424 U.S. 1, 17 (1976) (quoting *United States v. O'Brien*, 391 U.S. 367, 382 (1968)). The primary purpose of the act in *Buckley* was to limit the illegal use of campaign contributions. See *id.* at 26.

90. See Note, *supra* note 9, at 2083 (arguing that the government's "true interest lies in preventing the personal and property damage inflicted by terrorist groups, rather than in silencing their antigovernment message").

91. See, e.g., *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986).

92. See *id.* at 48.

93. See *id.* at 50-54.

group.<sup>94</sup> There is also a risk of a chilling effect on membership in controversial, nondesignated groups.

When governmental action curtails the fundamental right to associate it is subject to strict scrutiny.<sup>95</sup> In *Buckley*, the limitation on campaign contributions passed strict scrutiny.<sup>96</sup> The governmental interest of preventing illegal campaign fundraising and the appearance of corruption was found to be sufficient.<sup>97</sup> The Court held that the \$1000 limit was closely drawn because it focused on the problem of large contributions while leaving other means of association open, such as volunteer service.<sup>98</sup> The AEDPA provision would not fare as well because, although the interest in preventing terrorism may be sufficient, the means are not narrowly drawn. The AEDPA imposes a complete ban and does not realistically leave any other avenues open. The only way for some individuals to support a foreign organization<sup>99</sup> may be through donating money. The burden on association here, therefore, is much heavier than in the context of limits on campaign contributions.

Even more problems arise when the designation provision is considered. The Secretary of State is given broad discretion to designate foreign terrorist organizations<sup>100</sup> that at the time may be politically unpopular. Even with the requirement that the organization engage in terrorist activities,<sup>101</sup> the class of

94. "A number of complex motivations may impel an individual to align himself with a particular organization." *United States v. Robel*, 389 U.S. 258, 266 n.16 (1967) (drawing a distinction between an active member and a passive or inactive member who disagrees or is unaware of the group's unlawful aims).

95. *See Buckley v. Valeo*, 424 U.S. 1, 25 (1976) (citing *NAACP v. Alabama*, 357 U.S. 449, 460-61 (1958)).

96. *See id.* at 29.

97. *See id.* at 26.

98. *See id.* at 28.

99. The fact that the AEDPA deals with support for foreign organizations does not change the analysis. The First Amendment "right of association includes the right of Americans to associate with foreign organizations." *Terrorism Hearings*, *supra* note 7, at 161 (testimony of James X. Dempsey, Deputy Director, Center for National Security Studies) (citing *Lamont v. Postmaster Gen.*, 381 U.S. 301 (1965)).

100. *See* Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 302(a), 110 Stat. 1214, 1248-50 (amending the Immigration and Nationality Act, 8 U.S.C. §§ 1181-1188 (1994)). Section 302(a) provides:

(1) In General—The Secretary is authorized to designate an organization . . . if the Secretary finds that—

(A) the organization is a foreign organization;

(B) the organization engages in terrorist activity (as defined in section 212(a)(3)(B)); and

(C) the terrorist activity . . . threatens the security of United States nationals or the national security of the United States.

*Id.*, 110 Stat. at 1249-50.

101. "Terrorist activity" means any activity which is unlawful, where committed or in the United States, and involves any of the following, or attempting, threatening, or conspiring to do any of the following: highjacking; hostage taking; violently attacking an internationally protected person; assassination; and using biological or chemical agents, nuclear devices, explosives, or firearms with the intent to endanger one or more individuals, or to cause substantial damage to property. *See* Immigration and Nationality Act, 8 U.S.C.A. §

possible designees is great.<sup>102</sup> Under the AEDPA, "an entire group of people might be officially classified as a 'terrorist organization' based upon no more than one unlawful act committed by one of its members."<sup>103</sup>

The designation provision is further complicated by the fact that in a criminal action—for example, in a prosecution for violating the fundraising provision—the defendant is not "permitted to raise any question concerning the validity of the . . . designation as a defense or an objection."<sup>104</sup> This means that a financial contributor can be sentenced to jail for up to ten years with virtually no defense.<sup>105</sup>

#### IV. THE AEDPA'S TERRORIST AND CRIMINAL ALIEN-REMOVAL PROCEDURES AND THE DUE PROCESS CLAUSE

Several of the AEDPA's terrorist and criminal alien-removal provisions raise serious due-process concerns. Even though these provisions do not affect the average citizen directly, we all are affected. The legitimacy of our legal system is put into question whenever basic due-process rights are denied, even when denied to "undesirable" aliens.<sup>106</sup> This Part first determines what rights are due to a legal resident alien,<sup>107</sup> and then applies that analysis to the AEDPA.

It has long been established that a lawful resident alien is protected by the Fifth Amendment and may not be deprived of life, liberty, or property without due process.<sup>108</sup> In *Kwong Hai Chew v. Colding*, the Supreme Court stated, "[a]lthough Congress may prescribe conditions for [a lawful resident alien's] expulsion and deportation, not even Congress may expel him without allowing him a fair opportunity to be heard."<sup>109</sup>

1182(a)(3)(B)(ii) (West Supp. 1997).

102. As Walter Reich stated:

Persons and groups have carried out terrorist acts for at least two thousand years. During that considerable span of human experience, such acts have been carried out by an enormously varied range of persons with an enormously varied range of beliefs in order to achieve an enormously varied range of ends . . . [T]he list we can produce is breathtaking in its variety and scope.

Walter Reich, *Understanding Terrorist Behavior: The Limits and Opportunities of Psychological Inquiry*, in *ORIGINS OF TERRORISM* 261, 261-62 (Walter Reich ed., 1990).

103. O'Loughlin, *supra* note 16, at 114.

104. Antiterrorism and Effective Death Penalty Act § 302(a), 110 Stat. at 1249. However, the organization may appeal the designation within 30 days after publication. *See id.* An abuse-of-discretion standard of review is applied. *See id.*

105. The defendant cannot challenge the validity of the designation or argue that he was simply supporting the legal aims of the organization. Therefore, he is left with virtually no defense except that he did not contribute to the organization at all.

106. *See* O'Loughlin, *supra* note 16, at 104.

107. This Part deals only with the rights of lawful, permanent-resident aliens, and makes no assertions as to the due-process rights of illegal aliens.

108. *See* *Kwong Hai Chew v. Colding*, 344 U.S. 590, 596 (1953); *see also* *Landon v. Plasencia*, 459 U.S. 21, 32-33 (1982) ("[O]nce an alien gains admission to our country and begins to develop the ties that go with permanent residence, his constitutional status changes accordingly.").

109. *See* *Kwong Hai Chew*, 344 U.S. at 597-98.

Although the right to due process in deportation proceedings has been established, the specific contours of the process due are not as clear.<sup>110</sup> While not providing a direct answer, the Court in *Landon v. Plasencia* employed a three-factor balancing test, the *Eldridge* test, developed for use in administrative-law areas:<sup>111</sup>

In evaluating the procedures in any case, the courts must consider [1] the interest at stake for the individual, [2] the risk of an erroneous deprivation of the interest through the procedures used as well as the probable value of additional or different procedural safeguards, and [3] the interest of the government in using the current procedures rather than additional or different procedures.<sup>112</sup>

The AEDPA's alien-terrorist removal procedures clearly violate this test.<sup>113</sup> The Act allows the government, at a resident-alien deportation hearing, to present classified information in a summary report without revealing the classified evidence to the alien, while allowing the judge to examine all the evidence.<sup>114</sup> In addition to this secret evidence provision, unlawfully obtained evidence is

110. See *Plasencia*, 459 U.S. at 34 ("[T]he constitutional sufficiency of procedures provided in any situation . . . varies with the circumstances.").

111. See *id.* (citing *Mathews v. Eldridge*, 424 U.S. 319, 334-35 (1976)). See generally Michael Scaperlanda, *Are We That Far Gone?: Due Process and Secret Deportation Proceedings*, 7 STAN. L. & POL'Y REV. 23, 27-29 (1996); Amanda Masters, Comment, *Is Procedural Due Process in a Remote Processing Center a Contradiction in Terms?* *Gandarillas-Zambrana v. Board of Immigration Appeals*, 57 OHIO ST. L.J. 999, 1008 (1996); Jim Rosenfeld, Note, *Deportation Proceedings and Due Process of Law*, 26 COLUM. HUM. RTS. L. REV. 713, 737-49 (1995).

112. *Plasencia*, 459 U.S. at 34-37 (establishing test, discussing the individual's interests, and then remanding for consideration of other factors).

113. See Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 401(a), 110 Stat. 1214, 1258-68 (amending the Immigration and Nationality Act by adding a new title V). The Attorney General may seek removal under this new title if "removal under title II would pose a risk to the national security of the United States." *Id.*, 110 Stat. at 1260 (codified at 8 U.S.C.A. § 1533(a)(1)(D)(iii) (West Supp. 1997)).

114. See *id.*, 110 Stat. at 1262-63 (codified at 8 U.S.C.A. § 1534(e)(3)). This provision provides:

(3) TREATMENT OF CLASSIFIED INFORMATION.—

(A) USE.— The judge shall examine, ex parte and in camera, any evidence for which the Attorney General determines that public disclosure would pose a risk to the national security of the United States or to the security of any individual because it would disclose classified information.

(B) SUBMISSION.— With respect to such information, the Government shall submit to the removal court an unclassified summary of the specific evidence that does not pose that risk.

(C) APPROVAL.— Not later than 15 days after submission, the judge shall approve the summary if the judge finds that it is sufficient to enable the alien to prepare a defense. The Government shall deliver to the alien a copy of the unclassified summary approved under this subparagraph.

*Id.*

admissible against a resident alien.<sup>115</sup> This means that a legal resident alien, who has been convicted of no crime, can be deported based on illegally obtained and secret evidence.

By denying an alien the right to know all the evidence against him, the government is violating a fundamental element of due process, the right to confrontation.<sup>116</sup> Although he is entitled to an unclassified summary, he is still precluded from cross-examining the witness. It is also unclear how detailed the summary must be. The AEDPA states only that "the judge shall approve the summary if the judge finds that it is sufficient to enable the alien to prepare a defense."<sup>117</sup> The quality of defense is not addressed, and it is reasonable to believe that the defense will not be as "sufficient" as would be a defense based on full disclosure. The disparity is made clearer by the fact that the government's burden of proof is only a preponderance of the evidence.<sup>118</sup>

The Act does make one minor concession by providing counsel to any alien financially unable to obtain representation.<sup>119</sup> This comes at the expense of much needed evidence and is not a sufficient trade-off. In Judge Friendly's list of elements of a fair hearing, the right to call witnesses (#4), the right to know the evidence against one (#5), and the right to have the decision based solely on the evidence presented (#6), are all ranked higher than the right to counsel (#7).<sup>120</sup>

With these due-process concerns in mind, the *Plasencia* three-factor test will now be applied to the AEDPA. The first factor is the individual's interest at stake, and the failure to safeguard the individual's interest is undeniably a "great deprivation of liberty."<sup>121</sup> In *Plasencia*, the Court described the interest as "without question, a weighty one."<sup>122</sup> The Court continued: "She stands to lose the right 'to stay and live and work in this land of freedom.' Further, she may lose the right to rejoin her immediate family, a right that ranks high among the interests of the individual."<sup>123</sup>

The second factor (risk of error) is great, and the value of additional procedural safeguards is obvious. As stated earlier, the provision of counsel when needed does not fully compensate for the loss of the right to confrontation and the inability to provide the best defense possible. As one author points out, "Any

115. See *id.*, 110 Stat. at 1262 (codified at 8 U.S.C.A. § 1534(e)(1)(B)). "[A]n alien subject to removal under this title shall not be entitled to suppress evidence that the alien alleges was unlawfully obtained . . ." *Id.*

116. See Scaperlanda, *supra* note 111, at 25-26.

117. Antiterrorism and Effective Death Penalty Act § 401(a), 110 Stat. at 1262 (codified at 8 U.S.C.A. § 1534(e)(3)(C)).

118. See *id.*, 110 Stat. at 1263 (codified at 8 U.S.C.A. § 1534(g)).

119. See *id.*, 110 Stat. at 1261 (codified at 8 U.S.C.A. § 1534(c)(1)). Typically, aliens are not provided with counsel at the government's expense during deportation proceedings. See Scaperlanda, *supra* note 111, at 29.

120. See Henry J. Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267, 1279-95 (1977). Friendly advocated, "[I]f an agency chooses to go further than is constitutionally demanded with respect to one item, this may afford good reason for diminishing or even eliminating another." *Id.* at 1279.

121. Rosenfeld, *supra* note 111, at 744.

122. *Landon v. Plasencia*, 459 U.S. 21, 34 (1982).

123. *Id.* (citations omitted).



student of our immigration history ought to find the prospect of secret immigration proceedings cause for grave concern."<sup>124</sup> For example, *United States ex rel. Knauff v. Shaughnessy*<sup>125</sup> and *Shaughnessy v. United States ex rel. Mezei*<sup>126</sup> involved secret immigration proceedings, for reasons of "national security," where the exclusions were later (one and three years after detention, respectively) found to be baseless or insignificant to national security.<sup>127</sup>

The final factor, the governmental interest in maintaining the secrecy of classified information, is strong,<sup>128</sup> but, as discussed above, information does not always end up being as dangerous to national security as originally presented. Considering the "repeated, excessive deprivations of individual liberty that have been executed in the name of 'national security,' healthy skepticism is called for whenever this interest is invoked by legislators."<sup>129</sup> Therefore, the government's interest in keeping evidence secret from the alien, except in extreme cases, does not outweigh the individual's interests, particularly when coupled with the risk and history of error.<sup>130</sup>

These alien-deportation proceedings appear even more unjust when the alien's deportation is based simply on membership in a designated organization.<sup>131</sup> The AEDPA effectively resurrects the doctrine of guilt by association. Aliens can now be deported for association with the peaceful aims of an organization, rather than only deported for their own illegal conduct.<sup>132</sup> In 1990, the Immigration Reform Act specifically repealed guilt by association<sup>133</sup> by allowing deportation only upon a showing of actual participation in terrorist activity.<sup>134</sup>

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124. Scaperlanda, *supra* note 111, at 27.

125. 338 U.S. 537 (1950).

126. 345 U.S. 206 (1953).

127. See Scaperlanda, *supra* note 111, at 27-28; see also GELLHORN, *supra* note 47, at 141-43.

128. It has been argued that without the ability to keep information secret, law enforcement is hindered, and that if information and sources of information are kept classified, some deportation proceedings might not be brought against terrorists. See Scaperlanda, *supra* note 111, at 29.

129. Rosenfeld, *supra* note 111, at 747.

130. See *id.* at 748-49. "Secrecy should be the exception rather than the rule." *Id.* at 749. The government should at the very least be required to show that secrecy is *necessary* to prevent a *substantial* risk.

131. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 411(1)(c), 110 Stat. 1214, 1268-69 (amending 8 U.S.C. § 1182(a)(3)(B)(i) (1994)), adds to the list of excludable aliens "a member of a foreign terrorist organization, as designated by the Secretary." Defining an alien as excludable, in effect, also defines the alien as deportable. See 8 U.S.C. § 1227 (providing that any excludable alien shall be immediately deported).

132. See *Terrorism Hearings*, *supra* note 7, at 160-61 (testimony of James X. Dempsey, Deputy Director, Center for National Security Studies).

133. See *id.* at 160.

134. See Keisha A. Gary, Note, *Congressional Proposals to Revive Guilt by Association: An Ineffective Plan to Stop Terrorism*, 8 GEO. IMMIGR. L.J. 227, 239 (1994).

In addition to the secret-evidence provision, the criminal alien-removal provision of the AEDPA also contains possible due-process violations.<sup>135</sup> *Montero v. Cobb* sets out the major changes:

Along with increasing the number of crimes for which an alien can be deported, it mandates the detention of serious criminal aliens during the course of their deportation hearings. Prior to the 1996 amendment, section 1252(a)(2) contained a number of exceptions which had broadened the availability of bond detention hearings.<sup>136</sup>

There is no longer an exception for aliens who establish that they are not a threat to the community and that there is a strong likelihood that they will appear at future hearings.<sup>137</sup>

A resident alien recently challenged this mandatory-detention provision in a petition for habeas corpus.<sup>138</sup> In *DeMelo v. Cobb*, while "not undertaking to decide the constitutional issues at th[e] time,"<sup>139</sup> the court spent a great deal of the opinion discussing the constitutional issues. The court stated: "[A]pplication of a putative prohibition against any exercise of discretion by the Attorney General to allow DeMelo's release on bond, pending a hearing regarding deportation, raises serious due process issues."<sup>140</sup>

#### CONCLUSION

The course Congress and the President chose in enacting the AEDPA is not "the course of a strong, free, secure people, but that of the frightened, the insecure, the intolerant."<sup>141</sup> Obviously learning nothing from the past, they have responded to "the last atrocity" by resurrecting criminal prohibitions on protected

135. See Antiterrorism and Effective Death Penalty Act § 440(c), 110 Stat. at 1277 (amending 8 U.S.C. § 1252(a)(2)). The Act provides:

The Attorney General shall take into custody any alien convicted of any criminal offense covered in section 1251(a)(2)(A)(iii) [aggravated felony], (B) [possession of controlled substances], (C) [certain firearm offenses], or (D) [miscellaneous crimes, e.g., espionage, sabotage, sedition, selective service violations] of this title, or any offense covered by section 1251(a)(2)(A)(ii) of this title [conviction of two or more crimes involving moral turpitude] for which both predicate offenses are covered by section 1251(a)(2)(A)(i) of this title [classifying crimes of moral turpitude committed within certain time periods after the date of entry as deportable offenses], upon release of the alien from incarceration, shall deport the alien as expeditiously as possible. . . . [T]he Attorney General shall not release such felon from custody.

*Montero v. Cobb*, 937 F. Supp. 88, 89 n.1 (D. Mass. 1996) (all but last alteration in original; italicization in original) (quoting 8 U.S.C. § 1252(a)(2) as amended by the Antiterrorism and Effective Death Penalty Act § 440(c)).

136. *Montero*, 937 F. Supp. at 92 n.5.

137. See *id.*

138. See *DeMelo v. Cobb*, 936 F. Supp. 30 (D. Mass. 1996), *vacated as moot*, 108 F.3d 328 (1st Cir. 1997).

139. *Id.* at 34.

140. *Id.* at 32. The court also discussed a resident alien's right to due process. See *id.*; see also *supra* text accompanying notes 107-11.

141. *Speiser v. Randall*, 357 U.S. 513, 532 (1958) (Black, J., concurring).

forms of speech, the doctrine of guilt by association, and violations of due process in deportation proceedings. Today's suppression goes even further than the country's earlier reactions to Communism. There is virtually no limit to the number of unpopular groups, often including innocent, law-abiding citizens and alien residents, that can be affected by the AEDPA.<sup>142</sup> Once again, in the words of Justice Black, "[w]hen the practice of outlawing parties and various public groups begins, no one can say where it will end."<sup>143</sup>

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142. One may find *temporary* solace in the fact that as of the writing of this Note, well over a year after the AEDPA became law, the Secretary of State had not yet designated a single organization. But, Congress is getting impatient and 42 members have protested the delay, with one member claiming that the delay has made the Act "toothless." A.M. Rosenthal, *Slow on Terror*, NEW ORLEANS TIMES-PICAYUNE, Aug. 10, 1997, at B7 (reporting that Rep. Charles Schumer threatened to withhold a significant part of the State Department's budget if the list were not made public by September).

Several possible reasons for this delay exist. The State Department blames the delay on the preparation of briefs of justification to ensure each designation can stand up to judicial scrutiny. See Elizabeth A. Palmer, *Lawmakers Press Terrorism Issue; Secretary of State Urged to Designate Foreign Groups*, ROCKY MOUNTAIN NEWS (Denver), July 20, 1997, at 4A, available in 1997 WL 6846850.

One other possible explanation that has been argued is "domestic political concerns . . . especially a concern that the law might require the United States to label the Irish Republican Army as a terrorist organization. That could antagonize many Irish-Americans and complicate U.S. efforts to promote the peace process in Northern Ireland." *Id.*

143. *Communist Party of the United States v. Subversive Activities Control Bd.*, 367 U.S. 1, 145 (1961) (Black, J., dissenting).